Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 05-1580

JON E. OZMINT, Director, South Carolina Department of Corrections,

Petitioner,

vs.

ROBERT LEE NANCE,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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ARGUMENTS IN REPLY

I. **Petitioner does not primarily assert "only that the lower court made erroneous factual findings;" rather, Petitioner asserts that the lower court erroneously applied this Court's decision in *Cronic,* and that a proper analysis of Respondent's claims under *Strickland* shows he failed to prove actual prejudice.**

II. **The state supreme court did not rely upon an independent and adequate state law ground.**

III. **Respondent did not demonstrate actual prejudice under *Strickland* in the penalty phase of his trial based upon trial counsel's failure to (1) object to introduction of a 1981 conviction; (2) request a *Simmons* charge; or (3) object to use of the word recommendation in the jury charge.**

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ARGUMENTS IN REPLY

I. Petitioner does not primarily assert "only that the lower court made erroneous factual findings;" rather, Petitioner asserts that the lower court erroneously applied this Court's decision in *Cronic*, and that a proper analysis of Respondent's claims under *Strickland* shows he failed to prove actual prejudice.

Respondent (Nance) contends that this Court should deny certiorari because Petitioner allegedly is complaining only about the erroneous factual findings by the state supreme court. However, Petitioner's discussion of the "speculative showing" of lead counsel's supposed physical limitations (**Petition, pp. 13-16**) was designed to show how the lower court was misled into applying *Cronic* because of those perceived problems, "[m]uch like the dissent in *Cone*." **Petition, p. 13**. As both arguments in the **Petition** make clear, certiorari should be granted because, on remand, the state supreme court steadfastly refused this Court's prior directive to reconsider the case in light of *Florida v. Nixon*, 534 U.S. 175 (2004). Rather than meaningfully analyze Nance's ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984)'s two-pronged test, the state supreme court republished virtually all of its previously-vacated decision in the course of (again) finding that Nance had received ineffective assistance of counsel based upon a presumption of prejudice analysis. *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878, 679-84 (2006) (*Nance II*). Petitioner unequivocally asserts that the lower court's analysis is grossly inconsistent with this Court's Order remanding the case and its decisions in *United States v. Cronic*, 466 U.S. 648 (1984), *Nixon* and *Bell v. Cone*, 535 U.S. 685, 696-97 (2002) because trial counsel were present, they offered at least some defense for him at trial and their performance simply cannot be considered so egregious as to have completely precluded an adversarial proceeding. **Petition, pp. 6-17**. Also, a proper Sixth Amendment analysis under *Strickland*

shows that Nance did not prove actual prejudice - *i.e.*, he did not prove a reasonable probability of a different result but for counsel's errors. *Strickland*, 466 U.S. at 694-95. **Petition, pp. 17-29.**[1]

II. The state supreme court did not rely upon an independent and adequate state law ground.

Nance claims (**BIO, pp. 11-12**) that the state supreme court's decision "is arguably based on an adequate and independent state ground" because the lower court relied upon *Frett v. State*, 378 S.E.2d 249, 251 (S.C. 1988) in addition to *Cronic*. See *Nance II*, 626 S.E.2d at 883. As demonstrated in the **Petition**, the reliance upon *Frett* "is **not** a state law basis for applying a presumption of prejudice to Nance's claims. Rather, *Frett* is yet another example of the state supreme court's erroneous analysis of ineffective assistance claims under the Sixth Amendment. *Frett* cites *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), which in turn, relied upon *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982). *House* was overruled by this Court's seminal decision in *Strickland*." **Petition, p. 8 n.3**. Nance's present claim is contrary to the position he took below, since he conceded at oral argument that he had not raised a state constitutional ground in the PCR court and the issue was not preserved on certiorari. *See State v. Bailey*, 377 S.E.2d 581, 584 (S.C. 1989) (a party may not argue one ground at trial and then an alternative ground on appeal) Moreover, his current argument is belied by his unsuccessful argument on **pp. 3-4** of his **Return to Petition for Rehearing** that the state supreme court should recognize a presumption of prejudice in PCR cases, as a matter of

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[1]These points will not be argued again in Reply, since they are covered in the Petition.

state constitution[2] now, under S.C. Const art. I, § 14.[2]

III. Respondent did not demonstrate actual prejudice under *Strickland* in the penalty phase of his trial based upon trial counsel's failure to (1) object to introduction of a 1981 conviction; (2) request a *Simmons* charge; or (3) object to use of the word recommendation in the jury charge.

Petitioner has already addressed virtually all of the clams raised in the **Brief in Opposition** and has demonstrated that Nance failed to prove a reasonable probability of a different result under *Strickland v. Washington*, *supra*. However, Nance raises three ineffective assistance claims, relating to the penalty phase of his trial, that were not raised in *Nance II*, *supra*, and have not yet been addressed. **BIO, pp. 6-7**. Petitioner submits that he failed to demonstrate actual prejudice on these claims.

A. Evidence of 1981 conviction.

One of the prior convictions the State introduced in the penalty phase was an April 13, 1981, Lee County conviction for carrying a pistol on premises where alcoholic beverages are sold, for which Nance received a six month sentence, suspended on five years probation. **App. 732**. Nance contends that trial counsel were ineffective in failing to object to this conviction **(Applicant's Exhibit 29)** because this conviction was not one of his prior convictions. Even assuming *arguendo* that trial counsel

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[2]A state constitutional standard does, and has existed The farce and mockery standard, as stated in the 1962 case of *Crosby v. State*, 241 S.C. 40, 126 S.E.2d 843, 845 (1962) precluded relief unless the inmate proved that the alleged lack of effective assistance of counsel was of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice. Under this standard, mere allegations of incompetency or inefficiency of counsel did not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. Clearly, that standard requires an inmate to meet a higher burden than the two-prong *Strickland* test, and is not met in this case.

was deficient, Petitioner submits that this Court should grant certiorari because Nance defaulted on ant claim of prejudice by not challenging the PCR judge's finding that he failed to prove actual prejudice from counsel's performance certiorari in the state supreme court. As the result of his failure to make this argument in the lower that he was prejudiced by counsel's failure to object to the introduction of the April 1981 conviction, the law of the case is that there was no prejudice, *Caprood v. State*, 525 S.E.2d 514, 518 (S.C. 2000) ("Because the State has not appealed the PCR court's ruling that counsel was deficient in failing to protect his client's interests when a witness referred to Respondent's 'rap sheet,' that ruling is law of the case"), and only presumed prejudice entitles him to relief. ***See*** **App. 4923-27**,[3]

B. Absence of Simmons instruction.

Nance would have been ineligible for parole had he received a life sentence because of a prior voluntary manslaughter conviction. S.C. Code §§ 16-1-60 & 24-21-260 (Supp. 1993). He contends that trial counsel injected the issue of parole into the proceedings but failed to request a charge on parole ineligibility. The PCR court rejected these allegations. **App. 4918-20; 4958-**

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[3]To the extent, the Court finds that Nance did not default on the question of whether there was actual prejudice, Petitioner submits that any supposed error under *Johnson v. Mississippi*, 486 U.S. 578 (1988) was harmless beyond a reasonable doubt under *Clemons v. Mississippi*, 494 U.S. 738, 747 n. 5 (1990), for the reasons stated by the PCR court: the jury charge prevented the jury from relying on this conviction to prove a statutory aggravating circumstance, **App. 770-83**, the Solicitor only made a brief reference to this conviction in argument and did not argue it as a basis for a death sentence, **App. 756-67**; the trial court gave two instructions that limited the jury's consideration of prior convictions to evidence of his character, **App. 752-53; 778**; and the evidence concerning the 1981 conviction paled to the graphic eyewitness testimony and other evidence presented by the State concerning Nance's activities on the night of the murder. **App. 4923-27**. *See Edwards v. Scroggy*, 849 F.2d 204, 211-13 (8th Cir. 1988).

63; 4977-88; and the state supreme court did not address this claim in *Nance II, supra*. Even assuming *arguendo* that he was entitled to a *Simmons* charge or argument, he cannot show prejudice - *i.e.*, that "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Nance contends counsel was ineffective for failing to either argue parole ineligibility or request a "life without parole" instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). However, trial counsel cannot be held ineffective for not having the psychic ability to foresee this Court's changes in the law. Before this Court's 1994 ruling in *Simmons* (and including the time of counsel's representation),[4] state law was that any requested charge on parole ineligibility should not be given; and that a charge that "life imprisonment" should be understood in its "plain and ordinary meaning" would ensure a reasonable juror understood that life imprisonment was without parole. *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993). Because counsel's failure to request this charge was consistent with then-existing state law, Nance has not shown any prejudice. *See Strickland*, 466 U.S. 668, 689-90 (1984); *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995) (counsel not ineffective for failing to proffer evidence of future adaptability to prison even though this Court had granted certiorari in *Skipper). Cf. O'Dell v. Netherland*, 521 U.S. 151(1997) (finding *Simmons* was a "new rule"under *Teague v.*

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[4]Nance was tried from June 21-25, 1993. A Notice of Appeal was served on June 28, 1993. Thereafter, Nance filed a motion for a new trial. The trial court denied the motion on July 16, 1993. Nance's appeal from the denial of the new trial motion was consolidated with the direct appeal from his verdicts and sentence of death. **See "Statement of the Case", Petition, pp. 3-4.** This Court granted certiorari in Simmons on October 4, 1993. *Simmons v. South Carolina*, 510 U.S. 811 (1993).

Lane, 489 U.S. 288 (1989) and not compelled by existing precedent).[5]

The case for rejecting Nance's claim here is even stronger than in *Kornahrens* and *Randolph*, since, unlike those cases, this Court *had not yet granted certiorari* in *Simmons*; and, at the time of Nance's trial, there was no express indication the Court was going to review the issue. Instead, at the time of Nance's trial, recent South Carolina precedent had not only repeatedly rejected such a claim but had noted that (1) "parole is not a proper consideration for a sentencing jury," and (2) that the United States Supreme Court had ruled the issue was a matter of state law. *Simmons*, 427 S.E.2d at 178-79 (citing *California v. Ramos*, 463 U.S. 992 (1983)).[6] Further, this Court's decision that *Simmons*

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[5]Ample *Strickland* authority from other jurisdictions also supports this conclusion. *E.g., Jameson v. Coughlin*, 22 F.3d 427 (2nd Cir. 1994) (appellate counsel not ineffective for failing to raise issue which would have been rejected under existing state intermediate court precedent, nor was counsel ineffective for failing to foresee that the state's highest court would later overturn that precedent); *Walker v. Jones*, 10 F.3d 1569, 1573 (11th Cir. 1994) ("[b]ecause Alabama courts had rejected similar claims and the Supreme Court had not yet decided *Cage v. Louisiana*, 498 U.S. 39 (1990), trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt"); *Lilly v. Gilmore*, 988 F.2d 783 (7th Cir. 1993) (appellate counsel was not ineffective for failing to raise *Miranda* issue which would have been meritless under long line of state precedent, including a decision filed a few months before appellate counsel filed his brief, even though the United States Supreme Court subsequently reversed that decision); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (trial counsel was not ineffective for not raising *Batson* challenge two days before *Batson* was decided); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990) (appellate counsel was not ineffective for failing to "realize that the [United States Supreme Court] was planning a significant charge in the existing law;" and the "failure to anticipate this change [does not rise] to the level of constitutional ineffectiveness")

[6]Trial counsel did request that a "plain and ordinary meaning" instruction be given to an individual juror if the juror mentioned parole during voir dire, **Defendant's Motion No. 28, App. 1126-27**, which reflects beyond

was a "new rule" further strengthens the case against Nance's claim of ineffective assistance. In *O'Dell*, the Court reviewed pre-*Simmons* precedent, including *Ramos*, and concluded: "[W]e think it plain that a reasonable jurist [prior the issuance of *Simmons*] would not have felt compelled to adopt the rule later set out in *Simmons*." 521 U.S. at 164. That the Court considered *Simmons* a new rule beyond mere application of prior precedent clearly removes any possibility that trial counsel was ineffective for failing to have sufficient psychic ability to foresee it.[7] Thus, Nance has not shown either deficient performance or prejudice.

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cavil counsel's awareness of the law as it stood in June 1993.

[7]Finally, Nance also complained in the lower court, about trial counsel's submission of the mitigator "Model Prisoner: placed on parole." Obviously, being a model prisoner who was placed on parole shows adaptability to prison life, which is a prototypical mitigator. *See e.g. Skipper v. South Carolina*, 476 U.S. 1 (1986). Clearly no prejudice arose from submission of a mitigator that highlighted Nance's past good behavior in prison. None of these aspects of Nance's trial resulted in interjection of parole to the jury. The references to the death of Nance's wife in the testimony of Dr. DeWitt did not mention parole, release or the type of crime, and were brief, isolated passages that were brought up only in the context of Nance's mental health history. Similarly, the testimony of Scott only mentioned "probation", and it also was a brief reference during a description of bizarre behavior. Further, the trial judge specifically gave the jury a limiting instruction that prior crimes evidence could only be used for character, and not be used as substantive proof of any aggravator. **App. 761-62; 785**. Thus, the jury was precluded from considering the prior conviction and sentence, and thus would not have considered parole in an aggravating fashion.

Further, the word "parole" was never mentioned to the jury by either side in argument. Also, the jury was only told about parole as a mitigator, and the jury was instructed that a mitigator is only a basis for a sentence less than death, not a basis for death. **App. 786-87**. The jury never once inquired whether Nance would be parole eligible if sentenced to life imprisonment. Thus, submission of the mitigator would not have caused the jury to focus on parole in a way that was prejudicial to Nance. *See State v. Perkins*, 481 S.E.2d 25 (N.C. 1997). Again, however, no prejudice resulted from counsel's failure to forecast this Court's departure from *Ramos* in *Simmons*.

C. The trial judge's charge did not violate *Caldwell v. Mississippi*

Nance also contends he received ineffective assistance because his trial counsel did not object to the trial court's sentencing phase charge that the jury only makes a "recommendation" of the sentence to be imposed. Petitioner submits that there was no prejudice from the failure to object because the charge was not improper under state law or the Eighth Amendment.

The charge in this case is sustainable under state law, which requires that the trial court convey the idea to the jury that its sentencing recommendation will be followed. *See State v. Johnson*, 410 S.E.2d 547, 556 (S.C. 1991) (rejecting a similar claim despite the trial court's repeated use of "recommend," because the trial court also instructed the jury the "ultimate punishment of this defendant will be in your hands"). First, the trial court's sentencing phase charges clearly made the jury aware that its "recommendation" would in fact be followed. After the jury had returned its guilt phase verdict and had been polled by the court, the trial court explained that because there had been a guilty verdict there would be a second portion of the trial, or a sentencing phase, following which the jury would recommend to the trial court the penalty that should be imposed upon the Nance. The trial court then specifically instructed the jurors that:

> now that there has been a guilty verdict in the guilt phase of the trial, we proceed to the second phase of the trial, the part of the trial where *you will listen to additional testimony and you will make a recommendation to the court with reference to the penalty that should be imposed by the judge. It will actually be your verdict as to what the penalty should be imposed.*

App. 714 (emphasis added). Other instructions by the trial court also conveyed to the jury the binding nature of their sentencing determination, such as the trial court's charge at the start of the penalty phase that the sole issue in the penalty phase was to determine life or death, and that the jury's sole function was "to determine whether the defendant should be sentenced to death or life imprisonment." **App. 730.** ***See also*** **App. 730-31;778C;781; 790.** This was sufficient under state law. *Id*; *State v. Middleton*, 368 S.E.2d 357 (S.C. 1988) (holding that similar "ultimate punishment of the defendant will be in your hands" language overcame the trial judge's repeated use of "recommend" in his sentencing phase charge).[8]

There also was no violation of *Caldwell v. Mississippi*, 472 U.S. 329 (1985), resulting from the use of the word "recommend." In *Caldwell*, the prosecutor specifically referred to the process of appellate review in death penalty cases in his closing argument, and he thereby intentionally "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." 472 U.S. at 341. This Court found the prosecutor's representation to the jury was "quite focused, unambiguous, and strong." 472 U.S. at 340. The Court further found that in the context of capital sentencing "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are *state-inducted suggestions that the sentencing jury may shift its sense of responsibility to an*

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[8]The trial court's charge only mirrored the language of section 16-3-20, which states that the jury is to make a "recommendation" of sentence to the trial judge. The trial court also gave instructions which are the functional equivalent of the language which this Court found made the penalty phase charges in *Johnson*,, and *Middleton* sufficient. In addition to the cited portions of the penalty phase jury charge, the instructions and questions of the potential members of the jury during *voir dire* unequivocally conveyed the binding nature of the jury's sentencing role, **App. 41-42;73-74; 79; 148-49; 161-62; 172; 184; 188-90; 213-14; 257; 271; 276-77; 299; 310; 312**, as did the state's closing argument. **App. 768; 776.**

appellate court."472 U.S. at 330 (emphasis added). As a result, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id* at 328-329.

That the holding of *Caldwell* is confined to representations by the state mis-characterizing the role of the jury, was clarified by *Dugger v. Adams*, 489 U.S. 401,(1989), where the Court specifically held that to establish a *Caldwell* violation, a defendant necessarily *must* show that the remarks to the jury improperly described the role assigned to the jury by local laws. 489 U.S. at 408. *See also Gaskins v. McKellar*, 916 F.2d 941, 953 (4th Cir. 1990) (the trial judge's use of the word "recommend" in describing its function to the jury did not present a *Caldwell* violation because the record did not contain reference, by either the prosecutor or the trial judge, concerning death sentence review; and the evidence concerning a prior, vacated death sentence did not improperly describe the role assigned to the jury by local law). In the present case, there is no *Caldwell* violation because, as argued before, the trial judge's sentencing phase charge meets the standard in *Johnson* and *Middleton*. Since the judge's charge as to the jury's role meets the requirements of state law, *Dugger* ends any *Caldwell* claim, and there was no prejudice from counsel's failure to object.

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